No. 15211

United States Court of Appeals

FOR THE NINTH CIRCUIT

COWLITZ TRIBE OF INDIANS, *Appellant*,

vs.

THE CITY OF TACOMA, *a Municipal Corporation*, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

THE HONORABLE GEORGE D. BOLDT, *Judge*

ANSWER BRIEF OF APPELLEE

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ANSWER BRIEF OF APPELLEE

APPELLEE'S STATEMENT OF THE PLEADINGS AND FACTS

Issues Raised By the Pleadings on Jurisdiction

This action was instituted by the appellant to enjoin the appellee from constructing two dams upon the Cowlitz River in Lewis County, Washington, and from selling any of its bonds in connection therewith until the alleged rights of the appellant can be ascertained.

Appellant sues here as an Indian tribe and not as individuals.

The appellant in its Complaint sets forth four separate causes of action (R. 3-13). All are based solely

upon its claimed aboriginal or Indian title. All property is located in Lewis County, Washington (Maps, Appellee Ex. 1).

Briefly these rights, as claimed in these four separately stated causes of action are as follows:

(1) Appellant claims a fee simple title and interest in all of the lands, including all the rights pertaining and appurtenant thereto which the appellee has acquired or will acquire in the construction and operation of the Mayfield and Mossyrock Dams on the Cowlitz River (R. 3-6).

(2) On information and belief, appellant alleges the existence of several Indian burial grounds which it is claimed will be inundated upon the completion of the dams; that the appellee has made no provisions for compensation; and that such acts violate the culture of the Indians and constitute a sacrilegious interference with their burial grounds (R. 6-8).

(3) Appellant alleges that Congress, by an act dated March 2, 1853, (10 Stat. 172), which established the territorial government of Washington, provided that certain lands should be set aside for schools and other purposes; that under said act certain of appellant's lands above described were appropriated without compensation to the appellant and without its consent, in violation of its aboriginal or original Indian title; appellant further alleges a violation by the appellee of the appellant's fishing rights on the Cowlitz River over the properties involved (R. 8-9).

(4) Appellant alleges that the appellee is violating appellant's rights in that no compensation has been paid to the appellant for the appropriation of its water rights on the Cowlitz River drainage, and that the appellee is proceeding to build said dams in violation of certain State statutes therein mentioned (R. 9-12).

Appellant then prays that the appellee be restrained from the construction of these dams, from selling any bonds in connection with the financing thereof until all rights of the appellant can be ascertained; and for judgment for damages in the total sum of $80,014,-861.39, with interest thereon, and for appellant's costs (R. 12-13).

The appellee in its Answer to the Complaint admits: That the City of Tacoma has passed Ordinance No. 14386, which provides for the building of two dams on the Cowlitz River, pursuant to a license issued by the Federal Power Commission, being Project No. 2016 issued November 27, 1951, under the Federal Power Act (16 USCA, 791 (a) through 823); that it is proceeding to build these dams in accordance with this permit, and that in so doing it is purchasing from the present owners and taking possession of the lands and rights involved in said project. The appellee either denies specifically or upon information and belief all of the remaining principal allegations of the Complaint (R. 13-17).

The appellee further sets up in its Answer eight separately stated defenses (R. 17-21). Four of these defenses are defenses involving the jurisdiction of the Court and the question as to whether or not the facts

alleged state a claim upon which relief can be granted to the appellant. These defenses are those which may be determined by a preliminary hearing in accordance with Rule 12(d) of the Federal Rules of Civil Procedure (R. 17-18). These defenses are set forth in appellee's Motion and Application for a preliminary Hearing (R. 21-23).

Briefly these four defenses are as follows:

(1) The Court has no jurisdiction of this cause, because all appellant's claims are based solely on aboriginal or Indian title, and the issues raised herein are political and are not judicial. In the absence, as here, of Congressional recognition of such title and specific authority for the appellant to sue for violation of any alleged rights so recognized, this Court has no jurisdiction over either the subject matter of this suit or the parties hereto, the appellant's only recourse being the prosecution of its claims against the United States under the provisions of the Indian Claims Act, which course it is pursuing, as more particularly set forth in "Defendant's Exhibits 2 and 3" which are annexed to Appellee's Answer (R. 17).

(2) The Court has no jurisdiction of this cause, because the appellant has no rights whatsoever, either legal or equitable, that are enforceable herein; all rights, if any, that the appellant may have had in the lands and rights pertaining and appurtenant thereto and involved herein, have been long extinguished by various acts of the Congress of the United States and the issuance of patents and grants pursuant thereto (except as still owned by the U. S.) by the United

States Government, copies of which patents, grants or conveyances, and index thereof, are marked as "Defendant's Exhibit 1" and annexed to appellee's Answer (R. 17-18).

(3) The Court has no jurisdiction of this cause, because the Complaint does not show on its face that the action is one arising under the Constitution or laws of the United States or otherwise within the jurisdiction of the Federal Courts; the action is between citizens of the same state, to-wit, the State of Washington, and the issues involve solely the title and rights to land located wholly within Lewis County, Washington, and over which the State courts have exclusive and original jurisdiction (R. 18).

(4) The Complaint fails to state a claim upon which relief can be granted (R. 18).

The Fifth Defense sets forth the fact that the appellant has now pending before the Indian Claims Commission of the United States a claim against the Government for the taking of the same lands herein involved, and attached to the Answer is "Defendant's Exhibits 2 and 3" (R. 18-19).

The Sixth Defense sets up the defense of the Statute of Limitations (R. 19).

The Seventh Defense sets up the defense of laches and estoppel (R. 19-20).

The Eighth Defense alleges abandonment and relinquishment by the appellant of any rights which it may ever have had in said lands (R. 20).

The jurisdictional defenses as set forth in appellee's first, second and third defenses are the issues here directly involved.

The appellee served and filed its Motion for an Order for a Preliminary Hearing on the first four defenses above mentioned, as provided for by Rule 12(d) of the Federal Rules of Civil Procedure (R. 21-23) (R. 23-26).

Interrogatories were filed by appellee (R. 74-84) and answered upon order of Court (R. 86-90).

Request for Admission of Facts and of the Genuineness of Documents were served upon the appellant and filed (R. 84-86). The appellant filed no answer thereto, and so the statements therein made became the facts of this case. The Court heard the matter and entered its Order dismissing the plaintiff's action on the ground that the Court was without jurisdiction over the subject matter, (R. 95-96), and this appeal followed (R. 96-97).

Facts Admitted and Pertinent to Jurisdictional Issues

The appellee, in support of the allegations in its Answer, attached to its Answer Exhibits 1, 2 and 3. These have been forwarded to the Circuit Court separate from the Record (R. 101, Item 24).

The genuineness of all of these exhibits has been admitted by the appellant by its failure to answer appellee's Request for Admission of Facts and of the Genuineness of Documents (R. 84-86).

Exhibit No. 1

This is a compilation of certified copies of all patents, grants or conveyances of all of the properties involved from the United States Government to appellee's predecessors in title, except property still owned by the United States Government as public domain, and property still held by the State of Washington as school land.

Attached to this exhibit is a summary of the patents and grants, with the page and volume numbers where the original instruments are filed in the Auditor's Office of Lewis County.

Briefly, the number of these patents and the acts of Congress under which they were issued are as follows:

A. PUBLIC LAND ACT (3 Stat. 566), passed by the Sixteenth Congress, Session I, Chapter 51, approved April 24, 1820, under which 23 patents were issued by the Government.

B. HOMESTEAD ACT (12 Stat. 392), passed by the 37th Congress, Session II, Chapter 75, approved May 20, 1862, under which 77 patents and 3 applications were issued by the Government.

C. RAILROAD LAND GRANT ACT.

1. 13 Stat. 365. Passed by the 38th Congress, Session II, Chapter 217, approved July 2, 1864.

2. 16 Stat. 378. Passed by the 41st Congress, Session II, Resolution No. 67, approved May 31, 1870.

6 patents were issued under these two acts.

3. 30 Stat. 597. Passed by the 55th Congress, Session II, Chapter 546, approved July 1, 1898. 2 patents were issued under this act.

4. 34 Stat. 197. Passed by Congress May 17, 1906. This was an extension of the indemnity provisions of the Act of 1898 above referred to. 2 patents were issued under this act.

D. ACTS INVOLVING INDIANS

1. 23 Stat. 96. Passed by the 48th Congress, Session I, Chapter 180, approved July 4, 1884. 3 trust patents were issued under this act.

2. 24 Stat. 388. Passed by the 49th Congress, Session II, Chapter 119, approved February 8, 1887. 2 trust patents were issued under this act.

E. SCHOOL LAND GRANTS

The Organic Act established the Territory of Washington, 10 Stat. 172 (1 Rem. Rev. Stat. 315), approved March 2, 1853.

The Enabling Act provided for the State of Washington, 25 Stat. 676, (Rem. Rev. Stat. 333), approved February 22, 1889.

F. PUBLIC DOMAIN STILL OWNED BY U. S. GOVERNMENT

The Federal Power Act, (16 U.S.C.A. 791-825r, pages 576 to 641, and as amended) provided for the disposition of these government lands.

After hearings before the Federal Power Commission, under Project No. 2016, a license was issued by the Commission to the appellee on November 28, 1951, to build these dams, which license was accepted and approved by the City as required under the act (R. 5).

The Commission further, in Section (B), Article 32, page 14, provides in part as follows:

> "* * * The Licensee shall also pay to the United States such charges as may be specified hereafter for the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands, including transmission line right-of-way." (R. 6).

From the foregoing, the undisputable facts are that all of the properties involved in the Cowlitz Project are embraced within the foregoing categories of properties and are shown on the maps forwarded to this Court by the lower Court as "Defendant's Exhibit 1" (R. 101, item 24) save and except certain right of ways for transmission line purposes.

Note that nowhere in any of the categories of these properties involved does the appellant have accorded to it or reserved to it any rights in these lands or rights in connection with said lands.

Exhibit No. 2

"Exhibit 2," attached to Defendant's Answer, is a copy of the original Petition, verified on August 2, 1951, by Simon Plamondon, a member of the appellant's tribe (R. 17).

In this Petition the appellant tribe makes claim against the United States Government under the authority of 60 Stat. 1050, et seq., Public Law No. 726, 79th Congress.

In Section II of this Petition, the appellant claims the lands and rights in all of Lewis, Cowlitz and Clarke Counties, and parts of Skamania, Wahkiakum

and Pierce Counties in the State of Washington (R. 75, Item 4; R. 86, Item 4).

The appellant alleges in this Petition that the:—

> "United States continued to encourage the settlement of lands of said tribe by American settlers, made numerous grants of land to such settlers out of the lands of said tribe and forcibly removed the Cowlitz Indians from their lands, all without compensation to said tribe and its members."

The appellant further alleges that the Tribe was deprived of its lands and rights in connection therewith, and asked damages of the Federal Government in the sum of $60,000,000.00.

Exhibit No. 3

"Exhibit 3" is a copy of the Answer of the Government to appellant's Petition above set forth as "Exhibit 2."

The United States contends the tribe has no rights, and its claim should be denied under *Duwamish et al vs. United States*, 79 Ct. Cls. 530, (Cert. denied 295 U.S. 755).

The appellant has filed to date in this action affidavits of the following: Malcolm S. McLeod (R. 31); Isaac Ike Kinswa (R. 27); Sara Costama (R. 28); John Eyle (R. 71); Frank Thomas (R. 69); Dr. Herbert C. Taylor (R. 39); and Malcolm S. McLeod (R. 90).

It would unduly lengthen this brief to set out or discuss these affidavits in detail. It is sufficient to say that while very interesting reading, they have no bearing whatsoever upon the issues involved herein.

APPELLEE'S ABSTRACT OF THE CASE

For the sake of clarity and continuity, the appellee briefly sets forth its abstract or statement of the case.

Appellant's Contentions

As before stated, this is an action by the appellant, as a tribe of Indians, to enjoin the building of dams on its claimed properties by the appellee; to enjoin the issuance of bonds in connection therewith; and to recover damages against the appellee in the sum of approximately $80,000,000.00

In other words, the appellant contends that it has superior title to all of the properties involved, over that of the appellee and the appellee's predecessors in title, including the original patentees and grantees from the Government, and is attempting in this action to try the title to these properties in a Federal court.

In a preliminary hearing on the jurisdictional defenses set up in the appellee's Answer (R. 17-18), the District Court held that the Federal courts had no jurisdiction and dismissed the action for lack thereof.

Questions Involved

Appellee submits that the questions involved in this appeal are those questions which were raised by the appellee in its Answer to the Complaint of the appellant and which were answered in the negative by the District Court (R. 17-18).

The question generally stated is as follows:

Does the Federal District Court have jurisdiction of the subject matter of any of the causes of action set forth in appellant's Complaint?

The specific questions involved are as follows:

1. Does the Complaint in this action show on its face, by a statement of legal and logical facts, that this suit is one which really and substantially involves a controversy based on the construction or application of the Constitution or some law or treaty of the United States.

2. Does this Court have jurisdiction over suits or claims based solely on aboriginal or Indian title in the absence of express congressional authority, or must such claims be filed and heard before the United States Court of Claims under the Indian Claims Act, 25 U.S.C. 70.

3. Does this Court have jurisdiction over the subject matter involving the parties to this action where the United States, under the authority of various acts of Congress, has by patents and grants divested itself and conveyed title to all of said lands and appurtenances to the predecessors in title of the appellee, save and except a small amount of lands still held by the United States as public domain and subject to disposition under the Federal Power Act.

ARGUMENT

Summary

Argument in Support of Order of Dismissal:

Federal District Courts are courts of limited jurisdiction and burden is on appellant to sustain its jurisdiction.

Appellant has no vested property rights within the "due process" clauses of the Constitution:

The Duwamish Case,

The Tee-Hit-Ton Case.

All rights appellant may have had have been extinguished by Congress.

Any rights appellant may now have are controlled by Federal Power Act.

Action to try title must be brought in county and under state law in which lands are located.

Argument in answer to appellant's argument:

Acts of appellee do not violate "due process" clauses of the U. S. Constitution.

No vested rights in appellant have ever been recognized by any acts of Congress and none exist.

Land grants reserved no rights to appellant.

Argument in Support of Order of Dismissal

The appellant in its Complaint, in all four causes of action, bases all of its rights claimed therein on its alleged aboriginal or Indian title to the land and rights in question. No treaty, no agreement or law involving any real controversy based on a Federal

question is pleaded as a basis for any of the rights claimed by the plaintiff.

Furthermore, the appellant, in all causes of action set forth in the Complaint, bases the jurisdiction of this Federal District Court on the sole grounds that the amount in controversy is over $3,000.00, and that a "Federal" question is involved.

Federal District Courts are Court of Limited Jurisdiction and Burden is on Appellant to Sustain its Jurisdiction

It is universally conceded that the Federal District Courts of the United States are courts of limited jurisdiction.

In 54 Am. Jur., Sec. 6, page 665, it is specifically stated:

> "The United States District Courts are courts of special or limited jurisdiction, as defined by acts of Congress. Only the jurisdiction of the United States Supreme Court is derived directly from the Constitution.
>
> "Federal courts which are inferior to the Supreme Court have no jurisdiction except such as is conferred by act of Congress. Their powers and duties depend upon the acts which call them into existence, or subsequent acts which extend or limit their jurisdiction. They must look to the act creating them and defining their jurisdiction as the warrant of their authority, and cannot go beyond the statute and assert an authority with which they have not been invested by it, or which may be clearly denied to them. Their jurisdiction

must be strictly exercised within the provisions of the acts conferring it. It is for Congress to say how much of the judicial power of the United States shall be exercised by the subordinate courts it may establish from time to time."

To the same effect see 54 ALR 10, page 671, and 1 Barron and Holtzoff, Federal Practice and Procedure, Section 21, page 39.

The Complaint must show by a statement of facts in legal and logical form that the suit is one which really and substantially involves a controversy based on the construction of or application of the Constitution or some law or treaty of the United States.

In 54 Am. Jur. Section 53, page 707, it is stated:

"The presence of a Federal question sufficient to confer jurisdiction must generally be disclosed by the complaint, by a statement of facts in legal and logical form such as is required in good pleading, showing that the suit is one which really and substantially involves a dispute or controversy as to a right which depends on the construction or application of the Constitution or some law or treaty of the United States. The essential facts averred must show, not as a matter of mere inference or argument, but clearly and distinctly, that a Federal question of that character is present in the suit. It may not be enough merely to allege that such a question exists in the case, or to make a mere formal statement that the suit arises under the Constitution and laws of the United States, particularly where it appears that such averment is not real and substantial, but is without color of right. A claim

must be alleged which rests on a reasonable foundation and which is something more than a mere colorable one. *The allegations of the complaint cannot be helped out by resort to the other pleadings, or by judicial notice.*" (Italics ours.)

If the jurisdiction of a Federal Court does not distinctly and affirmatively appear in the Complaint, the Court must dismiss the case unless the jurisdictional facts can and will be supplied by amendment.

54 Am. Jur., Sec. 140, page 771, states concerning this as follows:

"The jurisdiction of a Federal court must distinctly and affirmatively appear. If it does not thus appear, the court, upon having its attention called to the defect, or upon discovering it, must dismiss the case, unless the jurisdictional facts are supplied by amendment. District Courts are explicitly charged with the duty of enforcing their jurisdictional limitations."

Furthermore, the burden is upon the appellant, upon challenge being made, to sustain the jurisdiction of the court involved.

54 Am. Jur. Sec. 139, page 770, states:

"Whatever may have been the view taken by some early cases as to the burden of proof of jurisdiction being upon the defendant, it is now settled beyond question that where the Federal jurisdiction invoked by the plantiff is challenged in any appropriate manner, the burden is upon him to sustain the jurisdiction. Thus, the burden of establishing the jurisdiction of the Federal court is upon the plaintiff throughout the case.

> He should allege in his pleadings the facts essential to jurisdiction, and has no standing if he fails to make them; and if he does make them, an inquiry into the existence of jurisdiction may be had for the purpose of determining whether the facts support his allegation. * * *"

Where the controvery is over rights in real property such as here, the fact that titles involved may have emanated from the Federal Government or the controversy involves construction of Federal statutes, does not vest the Federal District Courts with jurisdiction in the matter.

In 42 Am. Jur., Sec. 71, page 847, it is stated:

> "* * * The mere fact that the title of the plaintiff comes from a patent or under an act of Congress does not show that a Federal question arises, and mere allegations to the effect that an adverse claim is based on an erroneous construction of a treaty do not necessarily present a case arising under the Federal Constitution, laws, or treatiees, of which a Federal court has jurisdiction without diversity of citizenship. * * *"

and in Section 70, page 846 of the same volume it is stated:

> "*It is the rule that the courts of a state must determine the validity of titles to land lying in the state, although such titles emanated from the Federal Goverment or the controversy involves construction of Federal statutes, and they can determine between individuals the priority or validity of conflicting titles under different grants from the same antecedent source.* In all

such cases an appeal may be taken to the Supreme Court of the United States, but no branch of the Federal judiciary has been invested with original jurisdiction in such cases." (Italics ours.)

The principles of law above set forth are also enunciated and adopted by the decisions of the United States Supreme Court.

In *Shulthis vs. McDougal*, 225 U.S. 561, 56 L. Ed. 1205, the Court on page 1211 states:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western states would so arise, as all titles in those states are traceable back to those laws. * * *"

In accord see *Taylor vs. Smith*, 167 Fed. (2d) 797; *Shoshone Mining Co. vs. Rutter*, 177 U.S. 505, 44 L. Ed. 845 (865);

Little York Gold-Washing & Water Co. vs. Keyes, 96 U.S. 199 (203) 24 L. Ed. 656 (658).

In Section 10, page 33 of 12 ALR (2d), the further point is made that where a Federal question is raised that has been decided by previous decisions of the Federal Supreme Court so as to foreclose the subject, then

it is not a substantial Federal question involved sufficient to vest the jurisdiction of the court thereof. This statement is there made:

> "A Federal question averred may be plainly unsubstantial because its unsoundness so clearly results from the previous decisions of the Federal Supreme Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy. * * *"

Numerous cases are cited in the footnote to the above quotation, in support of the principle set forth therein. These cases generally support the proposition that where the Federal Supreme Court has settled a question adversely to the plaintiff's contention, that issue then ceases to be a controversy involving a Federal question.

It is submitted that under the principles of law universally stated and above set forth, the Complaint in this action does not on its face show that a real and substantial Federal question is involved, and for this reason alone the District Court is without jurisdiction of this suit.

Appellant Has No Vested Property Rights Within "Due Process" Clauses of the Constitution

As hereinbefore stated, the appellant's claimed vested rights, which it contends are protected by the "due process" clauses of the United States Constitution, are based solely on aboriginal or Indian title. Appellee contends such rights are not those rights com-

ing under the protection of these "due process" clauses. Aboriginal or Indian title is a mere right of occupancy and is not a vested property right.

In 27 Am. Jur. Sec. 24, page 555, it is stated as follows:

> "It has been settled by repeated adjudications that the fee of the lands in this country in the original occupation of the Indian tribes has, from the time of the formation of this government, been vested in the United States. The Indian title as against the United States is merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they see fit until such right of occupation has been surrendered to the government. * * *"

The extinguishment of Indian title is entirely a question of governmental policy and is not open to contestation in judicial tribunals. 27 Am. Jur. Sec. 33, page 561.

There are many cases in the Federal courts that have decided and discussed various issues involving property rights of Indians, but there are two cases which have exhaustively analyzed and discussed these problems and have reconciled and interpreted many, if not the great majority of, the important cases dealing with these problems. For this reason these two cases are discussed and set forth herein at some length.

These cases are:

(1) *Duwamish et al Indians vs. United States*, 79 Ct. Cls. 530 (Cert. denied, 295 US 755), which was decided June 4, 1934; and

(2) *Tee-Hit-Ton Indians vs. United States*, 348 US 272, 99 L. Ed. 314, which was decided February 28, 1955, on a Writ of Certiorari to review a judgment of the United States Court of Claims (128 Ct. Cls. 82; 120 F. Supp. 202).

The Duwamish Case

The Duwamish case was brought before the U. S. Court of Claims under the authorization of 43 Stat. 886, chapter 214. There were nineteen Indian tribes as plaintiff in this action.

Five of the plaintiff tribes *were nontreaty Indians* and predicated their claim upon an unlawful taking of their tribal lands by the Government and the granting of the same to white settlers. (The appellants are nontreaty Indians and make the same claims.) (Italics ours.) In this case the Court, on page 597 and 598, states:

> "Five tribes, the Upper Chehalis, the Muckleshoot, the Nooksack, the Chinook, and the San Juan Island Indians, living in or adjoining the territory involved in this case, *have never entered into a treaty with the United States.* The defendant interposes a defense as to their claims, stated in the brief as follows: (Italics ours)
>
> "'* * * the Government never having recognized that these tribes were the possessors of title in any degree to the land now claimed by them, they have no right thereto which can be litigated in this or any other court; that whether or not an Indian tribe has title to any particular section is dependent in the first instance upon sovereign

recognition and that until that recognition has been accorded by the sovereign the entire matter rests in the realm of politics and is not determinable in a court of law or equity.'

"The issue thus presented, so far as cited precedents are available, has not heretofore been presented to the court. It is, we think, an important one, not to be ignored. The five tribes mentioned were not included in treaties because of dissatisfaction with the proffered terms, and continued to reside upon certain lands and certain ones did receive contributions of funds from the Government. *Their claim now is that a vast extent of territory to which they claimed Indian title has been allotted and disposed of to white settlers by the United States, contrary to the Indians' wishes, to their injury and loss of a large sum of money.*" (Italics ours.)

Again, on page 598 to 600 inclusive, in the *Duwamish* case, it is stated:

"* * * No case has been cited, and a diligent research reveals none, where tribal Indians have been recognized as *sui juris* entitled to sue in the courts of the United States for the taking of lands claimed merely by the right of occupancy. It may not be contended that the right of the United States with respect to Indian tribal lands and funds is not supreme. 'No private individual,' as said in the case of *Buttz v. Northern Pacific Railroad Co.*, 119 U.S. 55, 66, 'could invade it, *and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the Government, and are not open to contestation in the judicial tribunals.*' " (Italics ours.)

"* * * Tribal Indians claimed by right of occupancy such vast and unlimited areas of lands, encompassing in many instances the greater and better portions of what are now States of the Union, *that had it ever been the political policy of the Government to accord them the same proprietary right that attaches to a title superior to that of occupancy, and open the courts to suits as and for their taking when thrown open to public settlement by the United States, Congress and the courts would have left open no doubts upon the subject.*" (Italics ours.)

"Indian special jurisdictional acts, of which there are many, exemplify the established rule that resort to the courts by tribal Indians has always been restricted to adjudication of treaty rights and losses suffered by acts of Congress with respect thereto. The cases are too numerous to cite. As said in *Lone Wolf vs. Hitchcock*, 187 U.S. 553, 568:

" 'In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of who, as we have held, were in substantial effect the wards of the Government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. *If injury was occasioned, which we do not wish to be understood as imply-*

ing, by the use made by congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained.' " (Italics ours.)

"See also *Beecher v. Wetherby*, 95 U.S. 517; *United States v. Rogers*, 4 How. 567.

"We are of the opinion that this court is without jurisdiction in a case between tribal Indians and the United States for the recovery of the alleged value of lands thrown open to public settlement by an act of Congress, in the absence of a treaty or an act of Congress recognizing the Indians' title by right of occupancy to the same. The special jurisdictional acts do not confer such jurisdiction (*Mille Lac Indian case, supra*), and the issue is a political and not a judicial one."

In speaking on the necessity of governmental recognition of Indian title to ascertainable land in order to base any claim thereon, the Court states on page 602 and 603 of the *Duwamish* case as follows:

"* * * We cite these facts as disclosing the absence of any governmental recognition of Indian title to ascertainable territory claimed by them by right of occupancy, and no claim is now preferred of a divestment of title to reservation lands by the defendant. The plaintiffs state that no reservation was set aside for these Indians; and 'that acting under the friendly advice of an agent, thirty-three Indians took up homesteads on their tribal domain.' *If this is the situation and the tribes in the past and up to the present have*

failed to receive political recognition from the government and their right to any limited area of lands remains unrecognized, they remain in that status, for the correction of whatever inequalities or injustices prevail is for the determination of Congress and not the courts. To the extent of granting homesteads to the Indians the Government has exercised its political prerogatives; beyond this Congress has not gone, and we are convinced that no monetary liability exists because of an absence of such legislation. * * *" (Italics ours.)

The Tee-Hit-Ton Case, supra

This case contains a thorough discussion of the principles involved in this case. Space will not permit setting forth at length the important principles therein laid down, but hereinafter set forth are the more important and significant statements. Page numbers are from L. Ed.

This case was brought by the plaintiff under the Fifth Amendment for compensation for the taking of certain timber alleged to be a part of the tribal lands.

On page 319 the problem is stated as follows:

"The problem presented is the nature of the petitioner's interest in the land, if any. Petitioner claims a 'full proprietary ownership' of the land; or, in the alternative, at least a 'recognized' right to unrestricted possession, occupation and use. Either ownership or recognized possession, petitioner asserts, is compensable. If it has a fee

simple interest in the entire tract, it has an interest in the timber and its sale is a partial taking of its right to 'possess, use and dispose of it.' *United States v. General Motors*, 323 US 373, 378, 89 L. Ed. 311, 318, 65 S Ct 357, 156 ALR 390. It is petitioner's contention that its tribal predecessors have continually claimed, occupied and used the land from time immemorial; that when Russia took Alaska, the Tlingits had a well-developed social order which included a concept of property ownership; that Russia while it possessed Alaska in no manner interfered with their claim to the land; that Congress has by subsequent acts confirmed and recognized petitioner's right to occupy the land permanently and therefore the sale of the timber off such lands constitutes a taking pro tanto of its asserted rights in the area.

"The Government denies that petitioner has any compensable interest. *It asserts that the Tee-Hit-Tons' property interest, if any, is merely that of the right to the use of the land at the Government's will. That Congress has never recognized any legal interest of petitioners in the land and therefore without such recognition no compensation is due the petitioner for any taking by the United States.*" (Italics ours.)

On page 320 of the *Tee-Hit-Ton case* it is stated:

"There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation.

Hynes v. Grimes Packing Co., 337 US 86, 101, 93 L. Ed. 1231, 1245, 69 S Ct 968."

The Court on pages 320 and 321 of the *Tee-Hit-Ton* case as to Indian Title, states as follows:

> "*Indian Title.* * * * That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term. *This is not a property right* but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians." (Italics ours.)

The Court, in this case in quoting from *Beecher vs. Wetherby*, 95 U.S. 517, 24 L. Ed. 440, in respect to the rights of the Indians and the right of the government to take their lands, states:

> "'* * * Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government.' P. 525."

The Court further, on page 321, states as follows:

> "In 1941 a unanimous Court wrote, concerning Indian title, the following:
>
> "'*Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues.' United States v. Sante Fe Pacific R. Co.*, 314 US 339, 347, 86 L. Ed. 260, 270, 62 S Ct 248." (Italics ours.)

The Supreme Court further in this *Tee-Hit-Ton case*, after discussing various decisions and interpreting the language used therein, on page 323, states:

> "* * * *This leaves unimpaired the rule derived from Johnson v. M'Intosh that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment.*
>
> "*This is true, not because an Indian or Indian tribe has no standing to sue or because the United States has not consented to be sued for the taking of original Indian title, but because Indian occupation of land without government recognition of ownership creates no right against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law.*" (Italics ours.)

Footnote 21 on page 325 of the *Tee-Hit-Ton case supra* in reference to the right of the government to extinguish original title without compensation states:

> "The Departments of Interior, Agriculture and Justice agree with this conclusion. See Committee

Print No. 12, Supplemental Reports dated January 11, 1954, on HR 1921, 83d Cong.—Sess.

"*Department of Interior: 'That the Indian right of occupancy is not a property right in the accepted legal sense was clearly indicated when United States v. Alcea Band of Tillamooks* 341 US 48, 95 L. Ed. 738, 71 S Ct 552 (1951) *was reargued.* The Supreme Court stated, in a per curiam decision, that the taking of lands to which Indians had a right of occupancy *was not a taking within the meaning of the fifth amendment* entitling the dispossessed to just compensation. (Italics ours.)

" 'Since possessory rights based solely upon aboriginal occupancy or use are thus of an unusual nature, subject to the whim of the sovereign owner of the land who can give good title to third parties by extinguishing such rights, *they cannot be regarded as clouds upon title in the ordinary sense of the word.* * * *' " (Italics ours.)

"*Department of Agriculture:* 'We also concur in the belief which we understand is being expressed by the Department of the Interior that no rights presently exist on the basis of aboriginal occupancy or title. * * *'

"*Department of Justice:* 'Thus, there is no legal or equitable basis for claims or rights allegedly arising from "aboriginal occupancy or title." ' "

The Supreme Court of Washington, in *State vs. Towessnut* 89 Wash. 478 P. 154 Pac. 805, and in *State vs. Wallahee*, 143 Wash. 176, P. 254 Pac. 1083, has followed the same rules in respect to Indian or aboriginal title.

Appellee submits that, by the principles above laid down, Congress has the right to terminate and extinguish at any time and upon any terms that it sees fit, all Indian title or rights in said lands, and can do so without any claim for compensation, as such rights are not property rights vested in the Indians.

All Rights Appellant May Have Had Have Been Extinguished by Congress

Appellee contends that any rights that the appellant may ever have had have been long extinguished by the issuance of patents and grants by the United States under the several acts of Congress as hereinbefore set forth.

The United States had permanent title to the lands and rights in question and conveyed that title and those rights by the issuance of patents or grants to third parties.

In 42 Am. Jur., Sec. 10, page 792, it is stated:

> "Congress is invested by the Federal Constitution with the power of disposing of, and making needful rules and regulations respecting, the public domain. Its power in this respect is without limitation, and has been considered the foundation on which the territorial governments rest. * * *"

And in Section 3, page 785, of this volume, it is further stated:

> "The government and its grants are the true source of title to all lands in this country, and the

public lands of the United States are held by it, not as an ordinary individual or proprietor, but in trust for all the people of all the states. * * *

"The discovery of lands in the American continent, followed by actual possession, gave title to the government by whose subjects or by whose authority such discovery was made, not only against other European governments, but against the native Indian tribes. * * *"

The United States, by the issuance of patents and grants, divests itself of all title and rights in the land conveyed.

In 42 Am. Jur. Sec. 31, page 811, it is stated:

"A patent is the highest evidence of title, and with it passes all control of the executive department of the government over the title, and its subsequent destruction or the mutilation of its record, by such department, does not impair its validity. As a general rule, it is impeachable only for fraud or mistake, and in courts of law it is presumptive evidence of the true performance of every prerequisite to its issuance, including the payment of the consideration."

In respect to grants, in Section 32, page 812 in this volume, it is further stated:

"Every act of Congress making a grant is to be treated both as a law and a grant, and the intent of Congress when ascertained is to control in the interpretation of the law. A grant of this character is at least equivalent to a patent; in some respects, it has been regarded as a higher evidence of title than a patent, since it is a direct grant of the fee by the United States. * * * "

The issuance of a patent or grant vests in the grantee all interest of the United States in everything within the meaning of the term "land."

42 Am. Jur. Sec. 35, page 814 and 815, states:

> "In the legislation of Congress, a patent has a double operation. In the first place, it is documentary evidence having the dignity of a record of the existence of the title or such equities respecting the claim as justify its recognition and confirmation; in the next place, it is a deed of the United States. As a deed, its operation is that of a quitclaim, or rather of a conveyance of such interest as the United States possessed in the land. It passes only the title the government has, not only as it was at the time of the survey, but of the date of the patent. *It passes to the patentee all interest of the United States, whatever it may have been, in everything connected with the soil and in fact in everything embraced within the meaning of the term 'land,' including appurtenances, improvements, and crops growing thereon at the time of the grant.* * * * " (Italics ours)

In *United States vs. Alcea Band*, 329 U.S. 40, 91 L. Ed. 29, the Supreme Court of the United States, on page 35 (L. Ed.) states:

> "As against any but the sovereign, original Indian title was accorded the protection of complete ownership; but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will. *Termination of the right by sovereign action was complete and left the land free and clear of Indian claims.* Third parties could not

question the justness or fairness of the methods used to extinguish the right of occupancy. Nor could the Indians themselves prevent a taking of tribal lands or forestall a termination of their title. * * * " (Italics ours)

See also in accord *U.S. vs. Minnesota*, 270 U.S. 181, 70 L. Ed. 539, and Menominee Tribe of Indians case, 95 Ct. Cl. 232, where the effect of the issuance of a patent by the United States Government is ably discussed.

Thus it is clear that the authorities all hold that when the Federal Government, by Congressional authority, issues patents of land or grants of land of the public domain to patentees or grantees, such patents or grants divest the United States of all rights and interest to all of the "lands" embraced in such patents and grants, and the patentee or grantee takes all rights held therein by the Government, save and except that which is expressly reserved in such patent or grant.

Appellee submits that all rights that the appellant may have had in any lands in question have been extinguished by the issuance of the patents and grants as hereinbefore set forth as a matter of law. The appellants have no property rights upon which the District Court can base jurisdiction.

Any Rights Appellant May Now Have Are Controlled By Federal Power Act

Appellee further submits that not only have all rights that appellant may ever have had been extinguished by Congressional action, but also that any

remaining rights which the appellant may conceivably have at the present time in these lands involved are wholly and completely subject to disposition by the Federal Government and under its sole control, under the terms and provisions of the Federal Power Act, 16 USCA, Sec. 791 to 825r.

Section 818 thereof specifically provides that from the date of the filing of the application for license, all lands owned by the Government and included in any proposed project shall be withdrawn from other disposal. Thus, any rights that the appellant claims it presently has are subject to the exclusive disposal and extinguishment thereof by the Federal Government under the terms of the Federal Power Act. The Supreme Court of Washington has recognized this power.

In *Tacoma vs. Taxpayers*, 43 Wn. (2d) 468, 262 P. (2d) 214, our Supreme Court on page 481 states:

> " * * * The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; 'that the running water is a great navigable stream is capable of private ownership is inconceivable.' Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion."

Again, on page 489 it is stated:

> " * * * On the authority of those decisions, we must hold that Congress had the constitutional power to enact the Federal power act and that, in

doing so, it intended to exercise its full jurisdiction to authorize the power commission to supersede state laws purporting to prohibit or limit the construction of dams on navigable streams. By passing the act, Congress pre-empted the entire field and authorized the power commission to issue licenses for such construction upon such conditions as it deemed proper."

Action to Try Title Must Be Brought in County and Under State Now in Which Lands are Located

It is further the contention of the appellee that both of the parties to this action are citizens of the State of Washington, and that this action is one which involves simply and solely questions as to the title to and the rights in lands located in Lewis County, Washington. The appellant is in no better position than any other citizen of the State of Washington, and must bring its action involving these lands against the appellant in Lewis County, in accordance with RCW 4.12.010 which provides that all actions for the determination of all questions affecting the title of, or for injuries to, real property must be commenced in the county in which the subject of the action or some part thereof is situated.

Furthermore, the Federal Courts have further universally held and enunciated the principle that the Federal District Courts must at all times be vigilant not to infringe upon the State Courts' jurisdiction and rights, and these principles are applicable to the case at bar.

In *Square D Co. v. United Electrical, Radio & Machine Workers of America*, 123 Fed. Supp. 776, the Court states on page 781 (3) as follows:

> "Preservation of our federal system requires the federal courts to give due regard to the rightful independence of state governments by scrupulously confining their own jurisdiction to precise limits defined by statute. *Healy v. Ratta*, 292 U.S. 263, 270, 54 S. Ct. 700, 78 L. Ed. 1248; *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 67, 62 S.Ct. 15, 86 L.Ed. 47. *Cf. Silverton v. Rich*, D.C. Cal. 1954, 119 F. Supp. 434."

In accord see also *Parissi v. General Electric Co.*, 97 F. Supp. 333 [(4) page 335]; and *Farson v. City of Chicago*, 138 F. 184, (pages 186 and 187).

In determining its jurisdiction over a particular case, such as the case at bar, the Court can and should when necessary examine all of the facts in the case bearing upon the question of jurisdiction, whether they be by affidavits or other evidence, and when the plaintiff cannot supply proof of its jurisdictional allegations the Court should dismiss the case for lack thereof.

See *McGhan v. F. C. Hayer Co.*, 84 F. Supp. 540, [(4) page 541]; and *Smith v. Sperling*, 117 F. Supp. 781, [(6) page 787].

ARGUMENT IN ANSWER TO APPELLANT'S ARGUMENT

Acts of Appellee Do Not Violate Due Process Clauses of the U. S. Constitution

The appellant apparently contends in its argument (Appellant's Brief pages 7 to 24), first that the appellee, in acquiring the property and rights in connection with the building of the dams, is taking the property of the appellant without compensation and that, therefore, this is a violation of the 14th Amendment to the Constitution of the United States, and, second, that the rights claimed by the appellant have been specifically recognized by the Congress of the United States.

Appellant, in support of its first contention, cites the following cases, to-wit: (Appellant's Brief, p. 4 and 5)

(a) *Portland Ry. Light & Power Co. v. City of Portland,* 181 F. 632, (Appeal dismissed, 218 U.S. 686).

(b) *Iron Mountain R. Co. v. City of Memphis,* 96 F. 113.

(c) *Cuyahoga River Power Co. v. City of Akron,* 240 U.S. 462, 60 L. Ed. 743.

(d) *Road Improvement District No. 2 v. Missouri Pacific R. Co.* 275 F. 600.

Consider first the alleged violation of the due process clause of the 14th Amendment. In considering this question, it must be remembered that in order to constitute such a violation the *State* must deprive the

defendant of "property" without due process of law. In other words, the acts of the appellee City must be such as to constitute the act of the State, and the rights of the appellant alleged to be taken or violated must be "property" in the sense as being under the protection of this amendment.

Where the acts complained of were forbidden by the State Legislature or not authorized by the State, it cannot be said that the acts were those of the State, for the purpose of the Fourteenth Amendment.

In *Seattle Electric Co. v. Seattle R. & S. Ry. Co.*, a case out of the Western District of Washington, in 185 Fed. 365, the Circuit Court on pages 369 and 370 stated in respect to this proposition as follows:

> "These provisions have reference to state action exclusively, and not to any action of a private individual or corporation. It is the state that is prohibited from abridging the privileges or immunities of citizens of the United States, and from depriving any person of life, liberty, or property, without due process of law. * * * A municipal ordinance passed pursuant to the authority of the state which abridges the privileges or immunities of a citizen or deprives a person of property without due process of law may be therefore an act of the state prohibited by the Constitution. *But the ordinance to come within the prohibition of the amendment must, by implication at least, express the will of the state. It must be the act of the state. City of Louisville v. Cumberland Telephone & Telegraph Co.*, 155 Fed. 725, 729, 84 C. C. A. 151. * * * " (Italics ours)

In accord see *Snowden v. Hughes*, 132 F. (2d) 476 (478-479); *East St. Louis Ry. Co. v. City of East St. Louis*, 13 F. (2d) 852, [(3) page 853]; *Palestine Telephone Co. v. City of Palestine*, 1 F. (2d) 349, pages 349 and 350; *City and Town of San Francisco v. United Railroads*, 190 F. 507 [(1) (2) pages 510 and 511]; *Carolina and Northwest Ry. Co. v. Town of Lincolnton*, 33 F. (2d) 719 [(15) page 721].

The appellant in its Complaint specifically alleges that the acts of the appellee, of which Complaint is made, are in direct violation of the laws of the State of Washington (R5 - Par VI X R11). Consequently, the unescapable conclusion must be that these acts of the appellee complained of are not the acts of the State and, therefore, not within the Fourteenth Amendment.

Furthermore, all of the rights claimed by the appellant as set forth in its Complaint are based solely upon Indian or aboriginal title. No other bases or rights are alleged. Such rights are not "property" rights protected by either the Fifth or the Fourteenth Amendments to the Constitution. *(Tee-Hit-Ton Case*, and footnote 21 thereto, supra.)

In the light of the foregoing discussion, let us examine the four cases hereinabove set forth and relied upon by the appellant.

1. *Portland Ry., Light & Power Co. v. City of Portland*, 181 F. 632, supra.

This was a suit involving the plaintiff's right of way. In that case it was undisputed that the plaintiff owned

a street car system as vested property, and used a right of way over private property. The order involved would overlap and encroach upon plaintiff's right of way or land. Plaintiff brought the action in Federal Court, alleging a violation of its property rights under the due process clause. It should be specifically noted that in this case there is no dispute but that the plaintiff owned the railway system, the land and buildings in connection therewith, the franchise and other properties of such a system. All of the properties are universally recognized as vested property rights and thus were about to be taken away by the defendant City Council acting as an arm of the "State." This is clearly that type of property right coming within the purview of the 14th Amendment.

In the present case the Complaint does not state any fact showing any such type of property rights in the plaintiff protected by the Constitution. The only rights alleged are aboriginal or Indian title, which are not such rights as protected by the Constitution. This Portland case is no authority for the principle for which it is cited by appellant.

2. *Iron Mountain R. Co. v. City of Memphis*, 96 F. 113.

This was a suit to enjoin the forfeiture of the alleged rights of the plaintiff under a contract made between the plaintiff and the taxing district, which was the predecessor in title to the defendant city. The undisputed facts in this case also are that the plaintiff owned property, both real and personal, comprising

a complete railroad system, together with the necessary franchise, all of which are recognized vested property rights. This case held that the action of the defendant city was the action of the state and, there being vested property rights concerned, the action was one within the operation of the 14th Amendment. This case, like *Portland Ry., Light & Power Co. vs. Portland*, supra, is no authority for the jurisdiction of this court in respect to the case at bar.

3. *Cuyahoga River Power Co. v. Akron*, 240 U.S. 462, 60 L. Ed. 743.

In this case the Supreme Court found that the action of the Council involved was under its authority from the State. Furthermore, that involved in this case were clearly vested property rights of the plaintiff which would be affected or taken by the act of the defendant. Based upon these findings, the Court held that the Federal Court had jurisdiction as a violation of the 14th Amendment. This case is also in the same category of the foregoing and has no bearing on the case at bar.

4. *Road Improvement District No. 2 v. Missouri Pacific R. Co.*, 275 F. 600.

This involved an assessment which was made against the plaintiff without any pretense of affording the plaintiff notice and an opportunity to be heard. Obviously this procedure was unconstitutional. This case is not in point in any respect upon the proposition under consideration herein.

No Vested Rights in Appellant Have Ever Been Recognized By Any Acts of Congress, and None Exist

The other principal ground upon which appellant bases jurisdiction of the Court is the claim that vested property rights have been recognized in these lands by the Congress of the United States and the passage of certain acts. These acts are as follows:

The Northwest Ordinance of 1787, (App. Br. 6) 1 Stat. 50-51, Art. III.

The act establishing the Oregon Territory, (App. Br. 6) 9 Stat. 329, Sec. 14; passed Aug. 14, 1848.

The Treaty Act of 1850, (App. Br. 11) 9 Stat. 437; passed June 5, 1850.

The Organic Act establishing the Territory of Washington, (App. Br. 11) 10 Stat. 172, Sec. 12, (Rem. Rev. Stat. 315) approved March 2, 1853.

The Enabling Act establishing the State of Washington, (App. Br. 6) 25 Stat. 676, Sec. 4 (1 Rem. Rev. Stat. 331) (1 RCW 31); approved Feb. 22, 1889.

Washington State Constitution, Art. XXVI, adopted November 11, 1889. (App. Br. 11).

The pertinent portions of these acts are as follows:

1. *The Northwest Ordinance of 1787*, supra.

Article III, page 52, states:

" * * * The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; * * * "

2. *The Act Establishing the Oregon Territory*, supra.

Section 14 thereof incorporates by reference the Northwest Ordinance of 1787 above set forth. The Act, in Chapter CLXXVII, states in part:

> " * * * Provided, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or *to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law or otherwise*, which it would have been competent to the government to make if this act had never passed. (Italics ours.)

Section 12 prohibits the building of dams on salmon streams without certain protection to the salmon.

Section 20 grants sections Nos. 16 and 36 in each township for school purposes.

3. *The Treaty Act of 1850*, supra.

This act authorized the President to appoint one or more commissioners to negotiate treaties with the various Indian tribes in the Oregon Territory, and provided for their pay. This was not a mandatory but a permissive act.

4. *The Act Establishing the Territory of Washington*, supra.

This was an act which established the territorial

government of Washington. This act defined its boundaries and contained the following provision:

> " * * * Provided, That nothing in this act contained shall be construed to affect the authority of the government of the United States to make any regulation respecting the Indians of said Territory, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never been passed; * * * "

Section 12 thereof provides:

> "And be it further enacted, That the laws not in force in said Territory of Washington, by virtue of the legislation of Congress in reference to the Territory of Oregon, which have been enacted and passed subsequent to the first day of September, eighteen hundred and forty-eight, applicable to the said Territory of Washington, together with the legislative enactments of the Territory of Oregon, enacted and passed prior to the passage of, and not inconsistent with, the provisions of this act, and applicable to the said Territory of Washington, be, and *they are hereby, continued in force in said Territory of Washington until they shall be repealed or amended by future legislation.*" (Italics ours.)

Section 20 contained the same grant of Sections 16 and 36 in each township for school purposes.

5. *The Enabling Act Establishing the State of Washington*, supra.

This act provided in part:

> "That the people inhabiting said proposed states

do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States";

6. *Washington State Constitution, Art. XXVI*, supra.

This act contained the identical paragraph above quoted from the Enabling Act.

The appellant contends that the provisions of the acts set forth recognize and vest in the plaintiff Indian title to all of the lands involved in the Cowlitz project and involved in this case.

Congress, in forming the various territories out of the vast public domain existing in early days, provided generally for the initial government of the territories so set up, and these provisions were usually set forth in general language in the act creating the territory.

Thus, when the Oregon Territory was created by the act of August 14, 1848, Congress incorporated as a part thereof the old Northwest Ordinance of 1787 as a matter of general policy or guidance to be followed in the relationships with the Indians, these policies and provisions of the territorial acts being subject to later change or modification by subsequent acts of

Congress, the same as other laws. Certainly it was never intended that by these broad policy provisions contained in these acts that the Congress of the United States irrevocably recognized and vested Indian or aboriginal title to the Indians in all of the properties within the vast scope of the Oregon Territory, and which rights under no circumstances could be modified or changed by subsequent acts of Congress or by treaty.

Furthermore, the plaintiff surely does not also contend that Section 12 of the Oregon Territorial Act, which prohibits building of dams, is still in full force and effect and that all dams built since August 14, 1848, and located in the territory comprising the old Oregon Territory, are still subject to the provisions of this old section, notwithstanding the subsequent acts of Congress regulating such dams and including the Federal Power Act, 16 USCA Sections 791 to 825r. (App. Br.)

When Congress in 1853 passed the Organic Act establishing the Territory of Washington, which carved this Washington Territory, which later became the State of Washington, out of the original Oregon Territory covered by the Act of 1848 above mentioned, it specifically provided that as to this new Territory of Washington, only those laws of Congress passed subsequent to September 1, 1848, should apply. (Sec. 12, supra.)

Thus, it is obvious that all of the laws and the provisions relied upon by the appellant governing the

Territory of Oregon were passed prior to September 1, 1848, and consequently were no longer the laws applicable to the Washington Territory. The Act of 1853 which set up the Washington Territory in itself contained all of the provisions relating to this territory, and it should be specifically noted that the provisions in respect to the control of dams, contained in Section 12 of the Oregon Territory Act of 1848, was entirely omitted. The only provision then remaining in respect to the Indians' rights was the provision contained in Section 1 of the Washington Territorial Act above quoted. Certainly this provision did not in any respect recognize or vest in the appellant or any other Indians within the Washington Territory, Indian or aboriginal title to their tribal lands. This provision of the act simply and clearly reserved to the United States its former control over the Indians and their rights within the Washington Territory.

Neither does the enabling Act of 1889, under which the Washington Territory became the State of Washington, recognize or vest any Indian title or rights to any land in the appellant. The provision of this act above set forth again simply saved to the Indians and to the United States their respective rights and relationship that existed prior to the passage of this act. Their rights were the same as if this act had never been passed. It neither gave nor did it take from the government or from the Indians any rights not previously taken or given.

When the Constitution of the State of Washington was adopted, in Article XXVI thereof the same rights

of the Indian and of the United States were acknowledged. This provision again neither gave nor deprived the appellant of any rights in the lands within the State.

The appellant seems to argue (App. Br. 11, 16-17) that because the Congress of the United States, in the Treaty Act of 1850, authorized its representative to negotiate treaties with certain tribes of the northwest Indians, which would include the plaintiff tribe, that this in itself immediately vested and endowed the plaintiff with irrevocable Indian or aboriginal title, constituting vested rights and a legal encumbrance upon all the lands herein involved. (App. Br. 16-17.)

This act nowhere recognized or vested any rights in the Indians. It simply authorized a representative of the United States to negotiate and if the proper terms could be agreed upon to make a treaty subject to ratification by Congress.

The position of the appellee in this respect is well supported by the case of *Duwamish et al Indians v. United States*, 79 Ct. Cls. 530, (Cert. denied, 295 US 755, supra), which case has been heretofore fully discussed in this brief.

Please note that this Duwamish case involved several Indian tribes as plaintiffs, five of which were in the same category as the appellant—that is, non-treaty Indians—irrespective of the statement made by appellant on page 18 of its brief to the contrary. These non-treaty Indians were claiming compensation from the United States for the alleged unlawful taking of

their tribal lands—*lands which were a part of the old Oregon Territory and of the Washington Territory, lands covered by the acts of Congress above set forth, lands of the same type and category as here involved.*

Such claims were denied in that case. These are the identical facts here, and the same results must necessarily follow.

Furthermore, Congress, on March 3, 1871 (16 Stat. 566) 25 USCA 71, page 34, passed an act prohibiting the further making of new treaties with Indian tribes.

Thus, it is submitted that by the passage of the Treaty Act of 1850 Congress certainly did not intend to irrevocably vest in the Indians vested property rights which could never be changed by subsequent acts of Congress.

Land Grants Reserved No Rights to Appellant

Appellant further contends that the land grants made by the United States involved herein were made subject to and reserved to the appellant its Indian title; that such constituted vested rights and was an encumbrance upon the lands involved herein, and the taking thereof, it is alleged, is a violation of the due process clauses of our Constitution and appellant cites in support of its contention *United States vs. Santa Fe Railway Co.*, 314 U.S. 339 (App. Brief p. 20-24).

Very briefly, these land grants were made to the Northern Pacific Railway Company for the purpose of aiding the company in the building of the railroad. This road was to extend from Lake Superior to Puget

Sound on the Pacific Coast, and necessarily ran through many states and territories and undoubtedly crossed various Indian reservations or tracts of land in which Indian rights had been definitely recognized and which remain unextinguished.

It was anticipated further that some time would elapse between the time of the passage of the act in 1864 and the actual granting of the patents. As a matter of fact, the ten patents issued under the Railroad Act were issued during the period of 1894 to 1933, involving the lands herein concerned. (Ex. 1 annexed to App. answer - R 101, item 24.) The act, therefore, simply provided that where these recognized Indian rights did exist, the United States would extinguish those rights.

On page 21 of Appellant's Brief is set forth the provision of the grant act involved in the Santa Fe case. It should be noted that the act specifically calls for the extinguishment of Indian rights and "only by their voluntary cession." Furthermore, in this case Indian title and rights had been definitely recognized by the United States. This is not true in the case at bar.

The fallacy of the plaintiff's argument in this respect is the false assumption that at the time of the passage of the railroad acts of July 2, 1864, making these grants to the Northern Pacific Railroad Company, it had Indian title and rights to the land granted, and that such rights had been definitely recognized as vested property rights by the United States. This is not true. This act was passed after the territory of the

plaintiff had been opened to settlement by the Public Land Act of 1820, the Oregon Donation Act of 1850, the Homestead Act of 1862, and the acts extending the Homestead to Indians, and after the school land grants contained in the Organic Act establishing the Territory of Washington in 1853.

Thus, since the plaintiff had no rights or interests in these lands granted to the railroad companies, there were none to extinguish; and, in any event, the passage of this act itself and the issuance of the patents without specific reservation, constituted in itself an extinguishment by the United States of any claimed rights that the Indians may have had in this land.

Furthermore, it should be noted that in the *Santa Fe case* the United States was a party plaintiff and clearly it was a case within the jurisdiction of the Federal Court. This is not the case here.

It is submitted without further argument that the provisions in these railroad grant acts and in the school land grants simply preserve to the Indians and to the United States any rights and all relationships had between the two that existed prior to the passage of these acts, and that these acts neither granted nor took away any of these rights and in no way changed the relationship existing between the Indians and the United States.

CONCLUSION

In conclusion the appellee respectfully submits to this Court that the order of the Federal District Court, dismissing the appellant's causes of action heretofore

entered and on file in said cause (R3-13), should be affirmed and with costs taxed against the appellant as by law provided, on the grounds that the Court has no jurisdiction of this cause for the following reasons, to-wit:

1. There is no Congressional recognition of any title or rights whatsoever in the appellant to any of the lands or rights in connection therewith involved in this project, and no specific authority for the appellant to sue for the violation of any of these alleged rights has been recognized in any manner whatsoever by the Government.

2. Because all of the appellant's claims are based solely on aboriginal or Indian title and the issues raised herein are political and not judicial.

3. Because the allegations of the Complaint do not show that this action is one arising under the Constitution or laws of the United States or otherwise within the jurisdiction of the Federal Courts. Issues raised by a litigant that have been decided adversely by the Supreme Court of the United States are settled questions and a subsequent litigant cannot raise those same issues and base the jurisdiction of his cause of action thereon on the basis that said issues involve a Federal question. The naked assertion that a Federal question is involved is not sufficient.

4. Because the appellant has no rights, either legal or equitable, that are enforceable herein. Any rights that the appellant may have had in the past, based on its aboriginal or Indian title, were extinguished many, many years ago by the issuance of patents and

grants authorized by acts of Congress, copies of which patents and grants are on file herein. The remaining land which is involved in this project in which the appellant claims rights by this action is owned by the Federal government. Any rights that the appellant may have had in these lands were extinguished and terminated by the granting of a license to build these dams to the defendant under the authority of the Federal Power Act and the provisions in respect to public lands contained therein.

5. That the Congress of the United States has specifically granted to the appellant and to all other Indians or Indian tribes having any claim for a violation of their Indian title or rights in connection therewith, the right and the privilege to litigate and determine those claims before the Indian Claims Commission. The appellant's exclusive remedy for the violation of any such claimed rights is before the Indian Claims Commission, which course the appellant, as a matter of fact, is pursuing as particularly shown by appellee's Exhibits "2" and "3" annexed to appellee's Answer.

6. That this action between the citizens of the State of Washington, and the issues involve solely the title and rights to land located wholly within Lewis County, Washington, and over which the State courts have exclusive and original jurisdiction.

Respectfully submitted,

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By
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